SUBJECT INDEX

Page

STATEMENT OF THE CASE 2-9

ARGUMENT

I. The District Court properly admitted hospital records into evidence consisting of consultation reports of Dr. John C. Jones and Dr. Grant Beckstrand, Cancer Experts 9-18

II. The Court of Appeals correctly held that the shipping articles were ambiguous and that extrinsic evidence was admissible to show the intent of the parties to serve aboard the vessel for one trip or voyage rather than for a period of twelve months 18-23

III. Petitioner cites no authority in support of Point III of Argument 23

IV. The District Court found and the record overwhelmingly supported the finding that Respondent Medina was not negligent; that the pain and suffering, if any, of Erickson and his resultant death was caused by cancer 24-25

V. Conclusion 25

TABLE OF AUTHORITIES CITED

Cases

Page

Baltimore & O. R. Co. v. O'Neill, 211 F. 2d 190 (6 CCA 1952) 12

Buckminster's Estate v. Commissioner, 147 F. 2d, 331 (2 CCA 1944) 14

Chapman v. United States, 194 F. 2d 974 (5 CCA 1942) 12

England v. United States, 174 F. 2d 466 (5 CCA 1949) 11

Farrell v. United States, 336 U. S. 511 (1949) 22

Gencarella v. Fyfe, 171 F. 2d, 419 12

Glazier v. Sprague S. S. Co., 103 F. Supp. 157 (D.C. E.D. Pa.) 13

Googe v. U.S. 101 F. Supp. 830 (N.Y. 1951) 17

Gordon v. Robinson, 210 F. 2d 192 (3 CCA 1954) 11

Hunter v. Derby Foods, Inc., 110 F. 2d 970 14

Luksich v. Mitisch, 140 Fed. Rep. 2d 812 21

Lykes Bros. S.S. Co. v. Grubaugh, 128 F. 2d 466 (5 CCA 1942) 12

Masterson v. Pennsylvania R. Co., 182 F. 2d 793 (3 CCA 1950) 10

Missouri-K.T. R. Co. of Tex v. Ridgway, 191 F. 2d 363, (8 CCA 1951) 17

Moran v. Pittsburgh-Des Moines Steel Co., 183 F. 2d 467 (3 CCA 1950) 17

TABLE OF AUTHORITIES CITED (Continued)

New York Life Ins. Co. v. Taylor, 147 F. 2d 297 (D.C. CCA 1944) 9, 13

Palmer v. Hoffman, 318 U.S. 109 (1943) 13, 14

Pekelis v. Transcontinental & Western Air, 187 F. 2d 122 (2nd CCA 1951) 12, 13

Ranger, Inc. v. Equitable Life Ass. Soc. of U.S., 196 F. 2d 968 (6 CCA 1952) 12

Reed v. Order of United Commercial Travelers of America, 123 F. 2d 252 14

Schering Corp. v. Marzall, 101 F. Supp. 571 (D.C. Dist. Col.) 12

The Quoque, 261 Fed. Rep. 414 19

The Thomas Tracy, 24 Fed. Rep. 2d 372 20

Statutes

Title 28 U.S.C.A., Section 1732 11

46 U.S.C.A. Section 541 19

46 U.S.C.A. Section 566 19

Textbooks

Barron & Holtzoff, Federal Practice & Procedure, Vol. 2, Page 696-697 13

No. 494 Misc.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

SARA ERICKSON, Administratrix of the Estate of PETER ERICKSON, Deceased,
Petitioner,

— vs —

MANUEL MACHADO MEDINA,
Respondent.

RESPONDENT'S ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Answer of Respondent, MANUEL MACHADO MEDINA, to the Petition for Writ of Certiorari, respectfully shows:

STATEMENT OF THE CASE

In Respondent's opinion, Petitioner has not made a fair statement of the facts found in this case, and Respondent, in the interest of coherence, will completely restate the facts. CATR refers to Cross-Appellant's Typewritten Transcript of Record. TR. refers to the printed Transcript of Record.

Peter Erickson, hereinafter referred to as "Erickson" was an engineer, a member of the Machinists Union, A.F. of L., and employed in the capacity of engineer aboard tuna vessels. (Exhibit E). In May, 1947, Erickson was employed as Chief Engineer aboard the fishing vessel MARY LOU. He became ill in the early part of said voyage and was flown back from Guaymas, Mexico, to San Pedro, California, with a lung infection. He was sent to the desert for some time and resumed his occupation as an engineer upon his return. (Exhibit Q, CATR. p. 114). On October 17, 1947, Erickson sailed as Chief Engineer on the F/V PATRIA, and executed shipping articles with the master of said vessel. (Exhibit F). On December 29, 1947, Erickson sailed again aboard the F/V PATRIA and executed new shipping articles. (Exhibit G). On April 12, 1948, Erickson sailed as Chief Engineer on the F/V ALPHECCA and executed new shipping articles. (Exhibit 4). The crew members of the F/V ALPHECCA executed the same form of shipping articles on April 12, 1948, (Exhibit H) and again on September 28, 1948 (Exhibit I). None of the purported shipping articles were executed before a Shipping Commissioner, but new shipping articles were executed prior to each trip. (Exhibits F, G, 4, H and I).

Prior to sailing, Respondent Medina, master and part owner of the F/V ALPHECCA, executed a written agreement with the

Cannery Workers and Fishermen's Union and the Machinists Union, of which the decedent, Peter Erickson, was a member (Exhibit E), regulating working conditions, rate of pay, division of profits between owners and crew, safety of the ship, and related matters. Said agreement, (Exhibit E) provided in part as follows:

> "Article 5
>
> SECTION 2. (a) If any member becomes ill or is injured accidentally on the boat in line of duty, either at sea or in port, a doctor's certificate may be required by the master before permitting said crew member to leave the fishing grounds to return home. *Any crew member returning home with the captain's approval shall receive a full share for that particular trip only.* The cost of transportation home shall be paid by the boat owners. If thereafter the captain employs a substitute to take such man's place upon return to port, then the amount paid the substitute shall be considered trip expense." (Emphasis ours).

Peter Erickson was a member of the Machinists Union and a person in whose behalf the agreement was executed.

On April 12, 1948, prior to sailing, Peter Erickson and other members of the crew of the F/V ALPHECCA signed purported shipping articles with Manuel Machado Medina as master (Exhibit 4) which provided in part as follows:

> "It is agreed between the master and seamen of the American oil ship ALPHECCA, of which Manuel M. Medina is at present master, or whoever shall go for master, now bound from the port of San Diego, California, to Balboa, Canal Zone, and other ports and points on the Pacific Coast and return, for one or more trips and such other ports and places in any part of the world as the master may direct, and

back to a final port of discharge in the United States for a term of time not exceeding 12 calendar months."

It was the established custom in the San Diego Tuna Clipper Fleet, of which the F/V ALPHECCA was a part, for seamen, including chief engineers, to be hired for one voyage only and that the word "voyage" was synonymous with the word "trip." (Tr. p. 151).

On April 12, 1948, at the time Erickson sailed as Chief Engineer on the F/V ALPHECCA, Erickson was 49 years of age, having been born on January 3, 1899.

On or about May 10, 1948, it was noted either by Emmett Fowler, the navigator, or Thomas Taylor, the cook, that Erickson had a cold and in the late afternoon of said day Emmett Fowler took Erickson's temperature and found it to be 102°. (CATR. pp. 36, 68 and 69, Tr. p. 111). This fact was reported to the Respondent Medina who ordered Erickson to bed. (Tr. p. 111). Erickson went to bed where he stayed continuously until he left the F/V ALPHECCA at Acapulco, Mexico, on May 21st about noon, except for going to the toilet and for a period of fifteen minutes to thirty minutes when he was rowed from the F/V ALPHECCA to the F/V QUEEN VICTORIA and returned to the F/V ALPHECCA on or about May 19, 1948. (CATR. pp. 49-52). Respondent Medina instructed Emmett Fowler, the navigator, and Thomas Taylor, the cook, to attend to the medical and physical needs of Erickson. Emmett Fowler, who was in frequent attendance of Erickson, had been an officer in the Navy from 1941 to 1945. He had served aboard submarines as Engineer Officer and as Executive Officer and had had considerable experience in treating colds. He had in a number of cases in the Navy

administered various sulfa drugs and penicillin to men on submarines. (CATR. p. 62). While Erickson was in bed, all of his meals were served to him by Thomas Taylor, the cook, who at intervals during the day attended to Erickson's wants. Erickson was served with special food prepared by Mr. Taylor and he was given various fruit juices which were available at all times, including tomato and grape juice. (CATR. p. 321). He was given alcohol rubs twice a day. He was given aspirin and made to drink substantial amounts of water. One complete course of twelve pills of sulfa-thiazole and a partial course of nine pills of sulfa-thiazole were given. (CATR pp. 78, 79, 80 and 81). His chest was rubbed with Vick's Vaporub and similar liniments. From the time Erickson went to bed until the time he left the F/V ALPHECCA on May 21st at approximately noon he had morning temperatures of approximately 99.5° rising to 102° or 103° in the late afternoon, except that on May 21st at 10:45 A.M. his temperature for the first time dropped to a subnormal of 96.8°. (Exhibit 9, CATR Vol. III, p. 448). Several days prior to sending a message to Public Health Service for advice, Mr. Fowler suggested to Respondent Medina that Public Health Service be contacted for medical advice. (Tr. p. 110 and 112). The first message requiring advice was sent to Public Health Service on May 17th. (Exhibit B, Tr. p. 110). An answer was received from Public Health Service on May 14th prescribing a course of treatment, which course of treatment had been and was followed. (CATR p. 84, et seq. pp. 88 and 89). Further information was furnished as requested and on May 18th a message was received from Public Health Service advising that they put into the nearest port with medical facilities. (CATR p. 42); that all of the medicines were available and the instructions given by

Public Health Service were followed, (CATR pp. 88 and 90); that at all times between May 10th and May 21st the weather was warm and the sea was calm; that at the time of the receipt of the message to put into the nearest port with medical facilities the F/V ALPHECCA was approximately 447 nautical miles from Acapulco, the nearest port with medical facilities; that the last message was received from Public Health Service about 10:00 A.M. and that at that time the vessel was fishing and catching fish, (Tr. p. 113); that approximately two hours later the F/V ALPHECCA rendezvoused with the F/V QUEEN VICTORIA which was headed for San Diego, California, (CATR p. 49, Tr. p. 113); that Erickson was taken over in a row boat to the F/V QUEEN VICTORIA for the purpose of securing transportation for him to San Diego on said vessel; that the master of said vessel refused to accept Erickson as a passenger and he was immediately returned to the F/V ALPHECCA (CATR pp. 51, 52, Tr. p. 114); that immediately thereafter the F/V ALPHECCA departed for Acapulco, (CATR p. 52); that en route to Acapulco the vessel stopped for approximately one hour and fished, catching three ton of fish (Exhibit 5); that the vessel arrived at Acapulco at approximately 10:00 A.M. on May 21st; that Erickson left the F/V ALPHECCA about noon on May 21st and was rowed ashore in a row boat; that between May 18th and May 21st Emmett Fowler daily injected Erickson with 3,000 units of penicillin in oil and wax; that daily between said dates Erickson received Terpin-hydrate and Kodeine and four tablets of Thompson's Vitamin Mineral tablets. On May 18th and 20th he received Sodium-phenobarbital. (Exhibit 9).

That immediately on arrival at Acapulco on May 21, 1948, Erickson was seen by a doctor of medicine and given additional

penicillin shots and other medication and on said date he flew by air from Acapulco to Mexico City, accompanied by a Mexican doctor. (CATR pp. 53, 233). Upon arrival in Mexico City he took passage on an airplane bound for Los Angeles where he arrived on the evening of May 22nd. He remained at home on May 23rd, Sunday, and was examined by Public Health Service on May 24th, and by them sent to McCornack General Hospital in Pasadena on May 25th. (Exhibit B, Exhibit C). X-ray pictures were taken of Erickson at McCornack General Hospital. (Exhibit 10-A to 10-O inclusive). X-ray plates were taken in the office of Dr. Petrich and at the San Pedro General Hospital. (See Exhibits 10 and 11, A, B, C, and D). That in all respects the treatment given Erickson while he was in McCornack General Hospital was comparable to the treatment which he had received aboard the F/V ALPHECCA, (Exhibit C, Exhibit 10). Erickson was released from McCornack General Hospital on June 25th but advised to return in three weeks for another chest x-ray inasmuch as there was a possibility that the pneumonia was secondary to a pulmonary neoplasm or cancer. (Exhibit 10, Final Summary). That while Erickson was in an outpatient status at McCornack General Hospital on July 23rd he went to see his own private physician, Dr. John M. Petrich, who had been his personal physician for several years. (Exhibit R, p. 3). Erickson saw Dr. Petrich again on July 30th, August 3rd, August 6th and August 23rd. (Exhibit R, pp. 6 and 8). On August 25th Erickson entered the San Pedro General Hospital as a patient of Dr. Petrich where he remained until his death on October 8, 1948; that while he was at San Pedro General Hospital x-rays were taken and a radiological report made thereon by Dr. Maurice M. Haskell who concluded as a result of his study of an x-ray plate taken of Erickson on August

25, 1948, that Erickson was suffering from probable malignant neoplasm bronchiogenic carcinoma and a lymphoblastoma and two possible unusual resolved inflammatory process. (Exhibit D-7). On August 29, 1948, Dr. John C. Jones, a well-known expert in the field of internal medicine, was called in as a consultant by Dr. Petrich at the request of Mrs. Sara Erickson, wife of Erickson, to examine Erickson to determine the cause of his illness and to prescribe treatment. (CATR p. 189). Dr. Jones personally examined Erickson, reviewed the hospital records and then stated in his own handwriting in a consultation report filed with the hospital records (Exhibit D-9) that in his opinion Erickson was suffering from an inoperable bronchiogenic carcinoma and that his condition was hopeless. (Exhibit D-9).

On September 4th Dr. Grant Beckstrand, a cancer expert from Long Beach, was called in for consultation by Dr. Petrich at the request of Mrs. Sara Erickson, wife of Erickson, and personally examined Erickson and reviewed the hospital charts and concluded in a consultation report in his own handwriting that in his opinion Erickson was suffering from a bronchiogenic carcinoma with liver involvement and that his case was hopeless. (Exhibit D-9). That the consultation reports were a part of the hospital records of the San Pedro General Hospital and required to be kept, and were made at or about the time the consultation took place.

Erickson died on October 8, 1948. Dr. Petrich, his physician, prepared a death certificate and certified the cause of death to be bronchiogenic carcinoma for one year plus with contributing cause to be metastasis to the liver for three months plus. (Exhibit P). That at the time of the trial, Dr. John Eneboe, a radiologist, examined all of the x-ray plates which were in evidence at the

trial and stated that in his opinion Erickson died as a result of a bronchiogenic carcinoma, and the witness, by reference to the x-ray plates, outlined the area and growth of the cancer.

ARGUMENT

I

THE DISTRICT COURT PROPERLY ADMITTED HOSPITAL RECORDS INTO EVIDENCE CONSISTING OF CONSULTATION REPORTS OF DR. JOHN C. JONES AND DR. GRANT BECKSTRAND, CANCER EXPERTS.

Questions number I and II presented for review, and argument in support of the reasons relying upon for the allowance of the writ, point number I, may be considered together because they all consider the same question, to wit: Did the District Court err in admitting into evidence the hospital records of the San Pedro General Hospital, including the consultation reports of Dr. John C. Jones and Dr. Grant Beckstrand, cancer experts who were called into the case by the attending physician at the request of the wife of the decedent? These men both made personal examinations of the decedent Erickson, studied the hospital records and charts, and each gave their diagnosis from their personal knowledge thereof.

Petitioner's claims are not supported by the authority cited by him. In the case of *New York Life Ins. Co. v. Taylor,* 147 F. 2d 297 (D.C.C.C.A. 1944), in a two to one decision in which a

very vigorous dissent was written by Associate Justice Edgerton, the Court affirmed the ruling of the trial court in refusing the admission, among other things, of the following: (1) Reports of conversations with the assured indicating that he had attempted suicide, (2) Report of consultation with a psychiatrist containing statements by the insured that he wished to die, and (3) Report of a psychiatrist showing a diagnosis of psychoneurosis hysteria, conversion type. The court in the statement of facts shows that much of the information contained in the psychiatrist's report was not based on personal observation by the psychiatrist, but upon previous history and what he had been told by others. The court after rehearing held that this was not admissable, but in conclusion the majority of the court held as follows at page 306:

> "The entire hospital records offered in this case are not before us. It may be that some of the entries are admissible. The test should be whether they are records of a readily observable condition of the patient or of his treatment. There is no magic in the word diagnosis which makes everything which can be included in that term admissible. Some diagnoses are a matter of observation, others are a matter of judgment, still others are a matter of pure conjecture. The admissibility of records of such diagnoses must depend upon their character. Certainly the hearsay accounts and the psychoneurotic conjectures contained in these records cannot be received without cross-examination as proof of a tendency to commit suicide."

The case of *Masterson v. Pennsylvania R. Co.* 182 F. 2d 793 (3 CCA 1950) was a case where a doctor of medicine wrote letters

to the railroad's chief medical examiner. Copies of these letters were attached to an answer to interrogatories filed by the plaintiff in the action. The letters indicated that the doctor had given plaintiff an examination and gave facts and history, findings and conclusions. They were admitted to evidence over objection. The court held that they were erroneously admitted.

Gordon v. Robinson, 210 F. 2d 192, (3 CCA 1954), involved the admissibility of conclusions of a police officer given on the witness stand. Although the Federal Business Records Act, Title 28 U.S.C.A. Section 1732, was not involved in that case, the court by way of dicta expressed its opinion on the admissibility of opinions and conclusions and hearsay statements contained in a police officer's report, and held in that case that such a report was not admissible in evidence under the Federal Business Records Act, supra. The court at page 198, however, did establish one test for admissibility:

> "* * * A record to be admissible should derive from an efficient clerical system and should be of such a nature that it would be competent evidence if testified to by its maker."

In *England v. United States*, 174 F. 2d 466 (5 CCA 1949) hospital records were involved but the record was full of England's account of his past life which was clearly hearsay, there were statements of opinions of individual physicians based on the past history and on England's repeated absences without leave resulting in his being tried four times by court-martial, and conclusions being expressed that he suffered from mental deficiency (organic brain disease). The court held these records inadmissible.

Lykes Bros. S.S. Co. v. Grubaugh, 128 F. 2d 466 (5 CCA -942) was of little help containing only a minimum discussion of the problem.

In *Chapman v. United States*, 194 F. 2d 974 (5 CCA 1942) there was involved the report of an Army Air Force Board concerning an airplane accident held inadmissible. It would appear that the decision in this case has been overruled by the case of *Pekelis v. Transcontinental & Western Air*, (2nd CCA 1951) 187 F. 2d 122, in which case certiorari was denied by the Supreme Court, 71 Supreme Court 1020, 341 U.S. 951, 95 Law Edition 1374, to which extensive reference will be made in a few moments.

In *Baltimore & O. R. Co. v. O'Neill*, 211 F. 2d 190 (6 CCA 1952) x-ray film were taken and a report thereon made for the appellant's medical witness and apparently furnished for the purpose of litigation. The court excluded the evidence.

In *Ranger, Inc. v. Equitable Life Ass. Soc. of U.S.*, 196 F. 2d 968 (6 CCA 1952), there is just a bare discussion of the problem in which the circuit court held that the district judge correctly attempted to restrict the use of hospital records to the entries which showed the dates of entry into and the discharge from the hospital. The court stated that reference in the hospital record to surgery, operation and anaesthetic were improperly admitted but were not prejudicial. This narrow view is obviously not the law.

In the case of *Gencarella v. Fyfe*, 171 F. 2d 419, there was involved a police report of an accident which involves an entirely different concept from that presented here.

In *Schering Corp. v. Marzall*, 101 F. Supp. 571 (D.C. Dist. Col.) there was involved laboratory notebooks which the court found had not been identified by the person who made the entries or by any person who saw these books contemporaneously with

the evidence which they purported to record. They were held inadmissible.

In the case of *Glazier v. Sprague S. S. Co.*, 103 F. Supp. 157 (D.C. E.D. Pa.) syllabus number 1 seems to support the view that diagnoses of physicians at a U. S. Naval Hospital relative to what caused disability of seamen were not admissible in evidence, but there was nothing in the case to substantiate the statement in the syllabus; the findings of fact, conclusions of law and discussions of the court indicate that the records were admissible as evidenced by the court's statement at page 158 when the court said in finding 3:

> "On April 3, 1946, plaintiff was admitted to U. S. Naval Hospital at Philadelphia suffering from a coronary occlusion. * * *"

Petitioner also relies on Barron & Holtzoff, Federal Practice & Procedure, Vol. 2, pages 696-697, but the text writer is merely summarizing the holding of the majority of the court in *New York Life Ins. Co. v. Taylor*, supra, and cites that case in support of the principle enunciated.

It is submitted that this court has put to rest the points raised by petitioner in connection with the admissibility of the consultation reports when this court denied a writ of certiorari in the case of *Pekelis v. Transcontinental & Western Air*, supra. In that case there was involved the admissibility of the findings, conclusions and recommendations of an Investigation Board which was required by the defendant in the event of any aircraft accident involving defendant's international aircraft. We quote extensively from the case because the circuit court in that case states rather clearly its position in regard to its interpretation of *Palmer v.*

Hoffman, 318 U.S. 109 (1943) and cites with approval the cases of *Hunter v. Derby Foods, Inc.*, 110 F. 2d 970, *Reed v. Order of United Commercial Travelers of America*, 123 F. 2d 252, *Buckminster's Estate v. Commissioner of Internal Revenue*, 147 F. 2d 331, and this Honorable Court denied a writ of certiorari in said case. The court, at page 129 states as follows:

> "The plaintiff finally argues that the reports were admissible under the Federal business entry statute, 28 U.S.C.A. Sec. 1732, which is set forth in the margin. Defendant replies that the decision of the Supreme Court in Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L. Ed. 645, precluded the admission of the reports. In the course of the opinion by Mr. Justice Douglas in that case it was said:
>
> " 'An accident report may affect (the) business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. * * * In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.' 318 U.S. 113, 114, 63 S. Ct. 480.
>
> "The reports in the case at bar were 'regular' within the meaning of the statute, because they were required not merely in investigating the accident at the Shannon Airport but all future accidents. However, the opinion of the Supreme Court added that regularity of preparation would not in itself be enough to justify the use of the evidence. We think the court evidently was aiming at the evils of introducing evidence built up to promote the self-interest of the entrant. Thus, the opinion stated that the purpose of the act was to 'facilitate admission of records which experience

has shown to be quite trustworthy.' 318 U.S. 113, 63 S. Ct. 480. Accordingly, 'the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation' was said to be the test for their qualification under the statute. 318 U.S. 114, 63 S. Ct. 480. The Circuit Court of Appeals had excluded the evidence on the ground that, as stated by the majority of that court, it was 'dripping with motivations to misrepresent,' Hoffman v. Palmer, 2 Cir., 129 F. 2d 976, 991. It was this consideration, we believe, that led the Supreme Court to say that the reports in Palmer v. Hoffman, supra, were not business entries within the meaning of the statute for the reason that: 'Their primary utility is in litigating, not in railroading.'

"The reports in the case at bar were against the interest of the entrant when made, since they charged serious fault on the part of employees Both and Langsdale, and whether or not completely accurate were clearly not part of a story cooked up in advance of litigation in the disguise of business records. Moreover, it is not the entrant who here sought to introduce the reports, but the plaintiff, and this too tends to show that they were not contrived by the entrant for litigation. Palmer v. Hoffman was given the above interpretation by this court in United States v. Moran, 151 F. 2d 661, 662, 167 A.L.R. 403, and Lopoczyk v. Chester A. Poling, Inc., 152 F. 2d 457, 460, note 4. We hold that Palmer v. Hoffman did not preclude the reception under the business entry statute of the reports offered in the case at bar.

"It might be argued on behalf of the defendant that the reports did not constitute a 'record of any act, transaction, occurrence, or event' within the meaning of the statute because they contained opinions. Opinions of physicians and a coroner regarding matters within their expert competency have been held admissible as business entries by this court. Hunter v. Derby Foods, Inc. 110 F. 2d 970 (coroner's death certificate); Reed v. Order of United Commercial Travelers of America, 123 F. 2d 252 (hospital record); Buckminster's Estate v. Commissioner of Internal Revenue, 147 F. 2d 331

(hospital record). We hold that inferences drawn by boards such as those set up in the present case were of the same general character, and were admissible.

"It may further be argued that the conclusions in the reports were in part derived not from the personal observation of the entrant, but from information supplied by persons under no business duty to report, and that they were, therefore, not 'made in regular course of any business' within the meaning of the statute. In Moran v. Pittsburgh-Des Moines Steel Co., 183 F. 2d 467, 473, the Court of Appeals for the Third Circuit, per Goodrich, J., in dealing with an accident investigation by the Bureau of Mines of the United States Department of the Interior, held as follows: 'The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation. These circumstances, by virtue of express statutory provision, go to weight rather than to admissibility. (28 U.S.C.A. Sec. 1732 in part: "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.") Moreover, this Court has several times held that hospital records are admissible under the statute, and certainly medical diagnosis is no less a matter of opinion based upon observation and perhaps hearsay than this report of the Bureau's investigation.'

"We agree with this interpretation of the Federal business entries act by Judge Goodrich, see V Wigmore on Evidence (3rd ed.) Sec. 1530a. Nor would the decision of the New York Court of Appeals in Johnson v. Lutz, 253 N.Y. 124, 170 N.E., 517, if we were to adopt its reasoning here, as we perhaps did in United States v. Grayson, 2 Cir., 166 F. 2d 863, 869, call for a different result. In the case at bar most, if not all, of the sources of information were from persons who were under a duty to report to these boards as part of their employment; we include among such persons not only the employees of TWA, but also the employees of the airport and of the Irish Government. If there were any

other sources of information, we do not think it would make any difference where expert boards, which appear to have been disinterested, were set up as a matter of business routine to weigh information from all sources and to draw inferences therefrom."

In support of the admissibility of said records, see also the case of *Moran v. Pittsburgh-Des Moines Steel Co.*, (3 CCA 1950) 183 F. 2d 467, *Missouri-K.T. R. Co. of Tex. v. Ridgway*, (8 CCA 1951) 191 F. 2d 363, and *Googe v. U. S.* (N.Y. 1951) 101 F. Supp. 830. In the last case, a sailor jumped out of a U. S. Hospital and the court held that the record of investigation which the clinical director was required to make following the casualty was admissible in evidence.

A copy of the consultation reports of Dr. Jones and Dr. Beckstrand are not available to Respondent at this time to attach to this answering brief. It should be made clear, however, that the report is very factual, stating in the handwriting of both doctors their personal examination of Erickson, their findings from their personal observations, their personal examination of other hospital records, including x-rays, and the medical and nurses' charts and their diagnosis. The evidence clearly established that the San Pedro General Hospital was a member of the American Hospital Association, and that members of the American Hospital Association have a standard form of procedure for the keeping of hospital records; that consultation reports are a part of the regular hospital records; that the hospital record is not complete until a consultation report has been made out and filed; that the hospital records of a patient are not filed by the Record's Room until the consultation reports have been prepared; that the consultation reports are made at or about the time of the examination,

and that if for any reason they are not filed within a short time after the examination, the consulting doctor is contacted and instructed to immediately file a consultation report. (See Tr. pp. 188, 189, 190 and 191.)

It is submitted that the District Court properly admitted the consultation reports of Dr. Jones and Dr. Beckstrand as a part of the hospital records kept in the regular course of business pursuant to the Federal Business Records Act, supra.

II

THE COURT OF APPEALS CORRECTLY HELD THAT THE SHIPPING ARTICLES WERE AMBIGUOUS AND THAT EXTRINSIC EVIDENCE WAS ADMISSIBLE TO SHOW THE INTENT OF THE PARTIES TO SERVE ABOARD THE VESSEL FOR ONE TRIP OR VOYAGE RATHER THAN FOR A PERIOD OF TWELVE MONTHS.

Petitioner's Question number III, IV and V presented for review, and Petitioner's Points number III and IV of his argument in support of the reasons relied upon for allowance of the writ of certiorari in this case will be considered together.

Petitioner assumes that the shipping articles were coastwise articles. This was not a coastwise voyage but rather a fishing voyage. In a coastwise voyage ships touch the various coastwise ports, each of which might constitute a trip or voyage except for the custom and practice in coastwise voyages to serve for a stated period of time. The evidence in this case shows a different custom

or practice with respect to the tuna industry operating out of San Diego Bay. The testimony of W. Wade Ambrose, supra, with respect to the custom and practice in the Port of San Diego to serve for one trip or voyage was not contradicted.

In 46 U.S.C.A. Section 541, et seq. there is found the provisions of law with respect to shipping commissioners and shipping articles and the type of shipping wherein shipping articles are required. Section 566 thereof provides as follows:

> "Sec. 566. *Exception as to shipping articles.* Section 564 of this title shall not apply to masters of vessels where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage, nor to masters of coastwide nor to masters of lake-going vessels that touch at foreign ports; but seamen may, by agreement, serve on board such vessels a definite time, or, on the return of any vessel to a port in the United States, may reship and sail in the same vessel on another voyage. R.S. Sec. 4513; Feb. 27, 1877, c. 69, sec. 1, 19 Stat. 252."

There is no requirement of law that fishing vessels engaged in the fishing trade on shares execute shipping articles, but they are free to do so. Shipping articles were executed between Respondent Medina and the members of the crew of said vessel, including Erickson, on April 12, 1948. Said shipping articles were not executed before a Shipping Commissioner. (Exhibit £).

In the case of *The Quoque*, 261 Fed. Rep. 414, affirmed in 266 Fed. Rep. 696, the shipping articles provided in part as follows:

> "From the port of Baltimore, Md., to such ports and places in any part of the world, via an American port, as the master may direct and back to a final port of discharge in the

United States, for a term of time not to exceed six calendar months."

The court in commenting on the shipping articles, at page 415 said:

"The Court's conclusion is that the shipping articles in question are too indefinite and uncertain as to the voyage and services contracted for to bind seamen thereby, they fail to give the nature of the voyage undertaken, or so to describe the same, either by general terms or positive specification, as that those acting thereunder, or affected thereby, can know or be advised of their contractural rights thereunder with any reasonable degree of certainty. They are, therefore, under Sec. 4523 of the Revised Statutes (7 U.S. Comp Stat. 1916, p. 8801), void. The libelants are not bound thereunder, and should be discharged, and paid the wages due them up to the date of their refusal to continue the voyage."

In the case of *The Thomas Tracy*, 24 Fed. Rep. 2d. 372, the shipping articles provided as follows:

"We, the undersigned, crew of the steamship THOMAS TRACY, whereof W. E. Bagley is the present master (or whosoever shall go as master), now bound from the port of coastwise to voyages, and back to a final port of discharge north of Cape Hatteras, and if so desired by the master, one or more other voyages to Mexico, West Indies, or ports in the United States on the Gulf or Atlantic Coasts, with the right to tow or to assist any vessel in distress, with liberty to call at intermediate ports, not to exceed in all six calendar months, do agree that, in consideration of the monthly wages against the names of each member of the crew, hereunder set, they severally shall and will perform the above mentioned voyage or voyages. * * *"

The Court in commenting on the shipping articles quoted at Page 374 as follows:

"Reading the phrase and considering the mandatory provision of the statute, requiring written articles for the voyage as to the term of time for which the seaman is shipping, there is indefiniteness. They attempt to describe the voyage, and not the term of time. The time is referred to as 'not to exceed in all six months.' They probably intended to put a limitation upon the possible duration of the voyage, and there is doubt as to whether or not it was intended to employ for six months. In that construction, the voyage was completed when the ship was discharged. U. S. vs. Westwood (C.C.A.) 266 F. 696; The Catalonia (D.C.) 236 F. 554; The City of Montgomery (D.C.) 210 F. 673; The Falls of Keltie (D.C.) 114 F. 357."

In the case of *Luksich vs. Mitisch*, 140 Fed. Rep. 2d 812, the Circuit Court of Appeals for the Ninth Circuit was presented with the question of executing shipping articles wherein the contemplated voyage was described as one from Los Angeles, California, to Mexican Waters, Mexico, for one or more trips and return, and such other ports and places in any part of the world as the master may direct and back to a final port of discharge in the United States for a term of time not exceeding six calendar months. The Court at page 815 said:

"The shipping articles do not embody all the basic provisions of the employment (*duration of contract* and completion) and consequently must be supplemented by additional terms to constitute a complete agreement."

The shipping articles in the case of *Luksich vs. Mitisch*, supra, are almost identical with those in the instant case and require the Court to determine from other evidence the intention of the parties with respect to the duration of the contract and its completion.

In the case of *Farrell vs. United States*, 336 U.S. Reports, 511, 93 Law. Ed. 850, 69 Supreme Court Reports, 707, the shipping articles there set out at page 856, 93 Law. Ed. read as follows:

> "From the port of Philadelphia to a point in the Atlantic Ocean to the eastward to Philadelphia and thence to such ports and places in any part of the world as the master may direct or as may be ordered or directed by the U. S. Government, or any department, commission or agency thereof * * * and back to a final port of discharge in the United States for a term of time not exceeding twelve calendar months."

The Court said at page 857, 93 Law. Ed.:

> "The twelve months period appears as a limitation upon the duration of the voyage and not as a stated period of employment."

The Court further said at page 856, 93 Law. Ed.:

> "It is not questioned that the general custom in ships, other than the coastwise trade, is to sign on for a voyage rather than for a fixed period."

This court's attention has already been called to the agreement between the owners of the F/V ALPHECCA and the Cannery Workers and Fisherman's Union and the Machinists Union, (Exhibit E). Article 5, Section 2 (a) provides in part that any crew member who became ill or injured and returned home with the captain's approval should receive a full share for that particular trip only. Mr. Ambrose testified that the custom and practice

in the Port of San Diego had been embodied and carried into the agreement (Exhibit E). Mr. Erickson had been an engineer on fishing boats for a long time and had served on fishing boats operating out of the San Diego area. There is a strong inference from these facts of his knowledge of the custom in effect in the Port of San Diego. In addition, there appears to be actual knowledge on his part of the custom and practice in the Port of San Diego as evidenced by his execution of shipping articles on each of three successive voyages and trips, to wit: October 17, 1947 (Exhibit F), December 29, 1947 (Exhibit G) and April 12, 1948 (Exhibit 4).

It is submitted that in view of the ambiguity and uncertainty of the shipping articles that the District Court improperly ruled that the contract of employment was for a period of twelve months and that there was no evidence in the record to support such a finding. It is submitted that the Circuit Court of Appeals correctly held that the shipping articles were ambiguous and the resort must be had to other evidence to determine the duration of employment.

III

PETITIONER CITES NO AUTHORITY IN SUPPORT OF POINT III OF ARGUMENT.

Under Point III of his argument on page 40 of Petitioner's Brief, Petitioner has cited eleven cases, none of which cases have anything to do with Point III of Petitioner's brief. All of the cases cited refer to admissibility of evidence under the Federal Business Records Act, supra.

IV

THE DISTRICT COURT FOUND AND THE RECORD OVERWHELMINGLY SUPPORTED THE FINDING THAT RESPONDENT MEDINA WAS NOT NEGLIGENT; THAT THE PAIN AND SUFFERING, IF ANY, OF ERICKSON AND HIS RESULTANT DEATH WAS CAUSED BY CANCER.

The testimony of Dr. Petrich, the attending physician, was read into the record by deposition. Dr. Petrich had been Erickson's attending physician for more than two years. He took x-rays and personally examined and treated Erickson for the last four months prior to his death. He stated in his opinion that Erickson died from a bronchiogenic carcinoma which he had for more than one year prior to his death with metastasis to the liver of over three months. In the death certificate he certified death to be from the same cause. A radiologist, Dr. Maurice M. Haskell, who testified by deposition and who had taken x-rays of Erickson at San Pedro General Hospital, concluded that the x-ray plates showed a probable malignant neoplasm bronchiogenic carcinoma and a lymphoblastoma. Dr. John Eneboe, a radiologist, testified from the x-ray pictures taken at McCornack General Hospital, pictures taken at Dr. Petrich's office, and pictures taken at San Pedro General Hospital, and came to the conclusion that Erickson was suffering from a bronchiogenic carcinoma with metastasis to the liver. Dr. Joseph J. O'Hara testified that he had been familiar with the case since 1950. He had studied the records of the McCornack General Hospital, all of the x-ray reports, Public Health Service records, and all of the records of the San Pedro General Hospital and

that in his opinion Erickson, at the time of his death, was suffering from a bronchiogenic carcinoma with liver involvement that was in existence at the time he signed aboard the F/V ALPHECCA on April 12, 1948. (Tr. p. 180-181).

In the face of all of this evidence, the evidence of Dr. Jones and Dr. Beckstrand, even if inadmissible, which is not conceded, would be merely cumulative and corroborative evidence. This case was tried by a court sitting without a jury and there is no indication that the Judge was unduly swayed by the testimony of the cumulative witness reflected in the consulting reports, where he had the direct testimony of four witnesses who testified, either on the witness stand or by deposition, and reached the same conclusion that Erickson died from cancer with liver involvement.

V

CONCLUSION

WHEREFORE, Respondents respectfully pray that the Petition for Writ of Certiorari be denied, and that the decision of the Circuit Court of Appeals be affirmed in all respects.

Dated: February 6, 1956.

Respectfully submitted,

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HIGGS, FLETCHER & MACK
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By FERDINAND T. FLETCHER
Proctors for Manuel Machado Medina,
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